Fung Fon Chen @ Bernard & Anor v The Government of Malaysia & Anor

HIGH COURT (KOTA KINABALU) — NO KK-24–160 OF 2011
DAVID WONG J
25 MAY 2012

Civil Procedure — Locus standi — Declaration and injunctive relief against government — Malaysia agreement — Sufferings in employments — Whether provisions honoured — Locus standi of plaintiffs — Whether issues justiciable — Vague pleadings — Whether claim scandalous, vexatious and abuse process of court

The plaintiffs were born in Sabah and therefore, were Sabahans. The first plaintiff served the Royal Malaysian Police Force. However after 19 years of service, he resigned as it was his contention that he was consistently overlooked. On the other hand, the second plaintiff served as a teacher from 2002–2005 but in his third year of service, he was dimissed. In addition to that, the second plaintiff was also a native Sabahan under the Federal Constitution who enjoyed certain protections. The plaintiffs' case centred upon the Malaysia Agreement ('the agreement') dated 9 July 1963. The agreement provided provisions which required signatories to ensure assurances, undertakings and recommendations agreed, were implemented. The plaintiffs contended that the defendants, as signatories of the agreement had failed to honour the provisions and as a result, the plaintiffs suffered in their former employments. The defendants applied to strike out the plaintiffs' claims under O 18 r 19(a) of the Rules of the High Court 1980 ('RHC'). Before the court, the parties' argument orbited around the locus standi of the plaintiffs; non-justiciable issue by the plaintiffs; the plaintiff's vague pleadings; whether the plaintiff's claim was scandalous, frivolous, vexatious and an abuse of the court's process.

Held, dismissing defendants' applications with no order as to costs:

(1) The plaintiffs, as Sabahans, had every right to ensure that assurances given by the signatories in the agreement were adhered to. These assurances were promised to them and the rest of the population of Sabah and to hold that they have no locus standi defeated their constitutional right of access to court. The signatories to it signed as trustee to the peoples of North Borneo and Sarawak who were the beneficiaries. The contention that the plaintiffs were not privy to the agreement was rejected as they were the beneficiaries (see para 23).

(2) There was no attempt by the plaintiffs' questioning the policy of the government of the day. It was a pure and simple question of whether the

agreement had been complied with by the defendants as they had agreed to do so by virtue of their signatories to it (see para 28).

(3) It was quite clear that the plaintiffs' claims relate to a breach of the assurance given by the defendants in the agreement. There was nothing vague about what they wanted. Whether or not the plaintiffs have proved their cases was an issue which was triable and to be determined at the hearing proper (see para 29).

(4) It may very well be that the plaintiffs were not happy as to how they perceived they were treated but the reliefs sought were not reinstatement to their position or damages. What they seek for was stated in the declarations which were not connected to their satisfaction. Even if there was no claim for compensation or damages, it did not mean that claim was academic and served no purpose. Providing solace to the plaintiffs was adequate as it involved a trustee and beneficiary-relationship in which the plaintiffs, as beneficiaries expected no less than for the defendants to do what was right (see paras 31–37).

(5) A cursory glance at the reliefs show that there was no relief seeking to quash the decision of any public authorities for their predicament. The declarations sought for were self-explanatory. The plaintiffs were asking the court to adjudicate whether or not the defendants had breached the agreement and O 53 of the RHC application was unsuitable (see para 41).

[Bahasa Malaysia summary

Plaintif-plaintif dilahirkan di Sabah dan dengan itu, merupakan rakyat Sabah. Plaintif pertama berkhidmat dengan Pasukan Polis Diraja Malaysia. Walau bagaimanapun, selepas 19 tahun berkhidmat, dia meletak jawatan kerana menghujahkan bahawa dia sentiasa diabaikan. Sebaliknya, plaintif kedua berkhidmat sebagai guru antara tahun 2002–2005 tetapi dalam tahun ketiga perkhidmatannya, dia telah diberhentikan. Di samping itu, plaintif kedua adalah juga berasal dari Sabah di bawah Perlembagaan Persekutuan yang menikmati perlindungan-perlindungan tertentu. Kes plaintif-plaintif berasaskan Perjanjian Malaysia ('perjanjian') bertarikh 9 Julai 1963. Perjanjian tersebut memperuntukkan peruntukan-peruntukan yang memerlukan penandatangan-penandatangannya menjamin jaminan, akujanji dan cadangan-cadangan yang telah dipersetujui, agar dilaksanakan. Plaintif-plaintif menghujahkan bahawa defendan-defendan, sebagai penandatangan-penandatangan perjanjian tersebut telah gagal untuk menghormati peruntukan-peruntukan dan akibatnya, pekerjaan-pekerjaan plaintif-plaintif terjejas. Defendan-defendan memohon untuk membatalkan tuntutan-tuntutan plaintif-plaintif di bawah A 18 k 19 (a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Di hadapan mahkamah, hujahan pihak-pihak berkisarkan sekitar isu locus standi plaintif; isu-isu

plaintif-plaintif yang tidak boleh dibicarakan; pliding plaintif-plaintif yang tidak jelas; sama ada tuntutan plaintif-plaintif adalah bersifat skandal, remeh, menyusahkan dan merupakan penyalahgunaan proses mahkamah.

Diputuskan, menolak permohonan defendan dengan tiada perintah tentang kos:

(1) Plaintif-plaintif, sebagai rakyat Sabah, mempunyai hak untuk memastikan bahawa jaminan yang diberikan oleh penandatangan-penandatangan dalam perjanjian tersebut dipatuhi. Ini merupakan jaminan-jaminan telah dijanjikan kepada mereka dan seluruh penduduk Sabah dan dengan memutuskan bahawa mereka tidak mempunyai locus standi menghapuskan hak perlembagaan mereka bagi akses kepada mahkamah. Penandatangan-penandatangan tersebut menandatanganinya sebagai pemegang-pemegang amanah kepada rakyat Borneo Utara dan Sarawak yang merupakan benefisiari-benefisiari. Hujahan-hujahan bahawa plaintif-plaintif tidak privi kepada perjanjian tersebut ditolak kerana mereka merupakan benefisiari-benefisiari (lihat perenggan 23).

(2) Tiada percubaan oleh plaintif-plaintif dalam mempersoalkan dasar-dasar kerajaan kini. Ia adalah persoalan yang tulen dan mudah sama ada perjanjian tersebut telah dipatuhi oleh defendan-defendan kerana mereka telah bersetuju untuk berbuat demikian menurut penandatanganan mereka ke atasnya (lihat perenggan 28).

(3) Adalah agak jelas bahawa tuntutan plaintif-plaintif berkaitan dengan pelanggaran jaminan-jaminan yang diberikan oleh defendan-defendan dalam perjanjian tersebut. Tiada apa-apa yang kabur mengenai apa yang mereka mahukan. Sama ada atau tidak plaintif-plaintif telah membuktikan kes-kes mereka adalah satu isu yang boleh dibicarakan dan akan diputuskan di pendengaran yang sepatutnya (lihat perenggan 29).

(4) Amat berkemungkinan bahawa plaintif-plaintif tidak berpuas hati dengan cara bagaimana mereka merasakan mereka dilayan tetapi relief yang dipohon bukan pengembalian semula kepada kedudukan kepada mereka atau ganti rugi. Apa yang cuba mereka cuba nyatakan dalam deklarasi-deklarasi tidak berkaitan dengan ketidakpuasan mereka. Malah, jika tiada tuntutan bagi pampasan atau ganti rugi, ia tidak bermakna tuntutan tersebut adalah akademik dan tidak mempunyai tujuan. Memberi ketenangan kepada plaintif-plaintif adalah mencukupi kerana ia melibatkan hubungan pemegang amanah dan benefisiari-benefisiari yang mana plaintif-plaintif, sebagai benefisiari-benefisiari menjangka daripada defendan-defendan untuk tidak kurang daripada melakukan apa yang betul (lihat perenggan 31–37).

(5) Sekilas pandang akan relief-relief menunjukkan bahawa tidak ada relief untuk memohon bagi membatalkan keputusan mana-mana pihak berkuasa awam bagi kesusahan mereka. Deklarasi-deklarasi yang dipohon boleh diperjelaskan sendiri. Plaintif-plaintif telah meminta mahkamah untuk mengadili sama ada atau tidak defendan-defendan telah melanggar perjanjian dan permohonan A 53 KMT adalah tidak bersesuaian (lihat perenggan 41).]

Notes

For a case on declaration and injusctive relief against government see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 5220.

Cases referred to

Balare Jabu & Ors v Merawa Sdn Bhd & Ors [2011] 4 CLJ 751, CA (refd)
Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)
Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal [2011] 6 MLJ 297; [2011] 8 CLJ 766, FC (folld)
Boyce v Paddington BC [1903] 1 Ch 109, Ch D (refd)
Government of Malaysia v Lim Kit Siang, United Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12; [1988] 1 CLJ (Rep) 63, SC (distd)
Karpal Singh v Sultan of Selangor [1988] 1 MLJ 64 (refd)
Lembaga Lebuhraya Malaysia v Semenyih Jaya Sdn Bhd [2010] MLJU 1737; [2011] 3 CLJ 159, CA (refd)
Robert Linggi v The Government of Malaysia [2011] 2 MLJ 741; [2011] 7 CLJ 373, HC (distd)
Ronald Beadle v Hamzah HM Saman & Ors [2007] 2 MLJ 201; [2007] 1 CLJ 421, CA (refd)
Sabil Milia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 3 MLJ 325; [2005] 2 CLJ 122, CA (refd)
Tan Sri Haji Othman Saat v Mohamed bin Ismail [1982] 2 MLJ 177, FC (refd)
Tengku Muhammad Fakhry Petra lbni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors [2011] 1 MLJ 128; [2010] 1 LNS 1390, HC (distd)

Legislation referred to

Constitution (amendment) Act 1971 s 8
Federal Constitution arts 153, 153(2), 161A(3), 161E(2)(d)
Public Authorities Protection Act 1948 s 2(a)
Rules of the High Court 1980 O 18 r 19(a), (b), (d), O 53

Kent Wong (Peter Marajin with him) (RM Marajin & Co) for the plaintiff.
Rahazlan Affandi bin Abdul Karim (Deputy Public Prosecutor, Federal Attorney General Chambers (Civil Division) Putrajaya) for the first defendant.
Zaleha Rose Hj Pantlin (State Attorney General Chambers Kota Kinabalu) for the second defendant.

David Wong J:

PROCEEDING

[1] Before me is an application by the defendants to strike out the plaintiffs' claims under O 18 r 19(a) or (b) or (d) of the Rules of the High Court. The plaintiffs' claims are these:

(a) a declaration that the first defendant had failed and/or neglected to expeditiously and fully carry out the Borneonisation of the federal public services in the State of Sabah;

(b) a declaration that the second defendant had failed and/or neglected to take such legislative, executive and/or such other actions as may be required in furtherance of and to fully implement the assurances, undertakings and the recommendation contained in the report of the Inter-Governmental Committee ('IGC'), 1962 dated 27 February 1963 in so far as the assurances, undertakings and recommendations relate to the Borneonisation of the federal public services in the State of Sabah and which are not implemented by express provision of the Constitution of Malaysia;

(c) a declaration that the first defendant had failed and/or neglected to advise the Yang di-Pertuan Agong under art 153(2) of the Federal Constitution to ensure the reservation for the natives of the State of Sabah such reasonable number of positions in the public services of the federal government, in particular in the Federal Departments in the State of Sabah;

(d) a declaration that the first defendant had failed to fully implement the specific assurance and recommendation in para 7 of Annex B to the IGC report that the chief minister of the second defendant shall be consulted before the Federal Cabinet shall advise the Yang di-Pertua Agong on the reservation of reasonable number of positions in the federal public services for the natives of the State of Sabah;

(e) a declaration that the amendment to the Federal Constitution by the repeal of art 161A(3) by s 8 of the Constitution (Amendment) Act 1971 (Act A30) is ultra vires art 161E(2)(d) of the Federal Constitution as the said amendment did not receive the concurrence of the Yang di-Pertua Negeri Sabah;

(f) a declaration that the second defendant had failed to take such executive or other appropriate action as shall be necessary to implement the assurance and recommendation contained in para 7 of Annex B to the IGC report that before advice by the Federal Cabinet is given to the Yang di-Pertua Agong in respect of the exercise of his powers under art 153

such advise in relation to the State of Sabah shall be given only after consultation with the Chief Minister of the State of Sabah; and

(g) a declaration that the natives of Sabah or the people belonging to the State of Sabah have a legitimate expectation that the Borneonisation of the federal public service in the state in terms of assurances and undertakings in the IGC report shall be fully and expeditiously implemented.

BACKGROUND FACTS

[2] The first plaintiff and the second plaintiff are what we call 'Sabahans' which means that they are person born in the State of Sabah or North Borneo (as it was known prior to independence). Apart from being a Sabahan, the second plaintiff is a native of Sabah which under our Federal Constitution provides certain protections and privileges.

[3] The first plaintiff was a member of the North Borneo police force from 23 August 1960–16 September 1963 upon which he opted to join the Federal Police Force which is now known as the Royal Malaysian Police Force. He in 1966 had also graduated with a certificate from the Kuala Kubu Baru Police College, Selangor after undergoing a six months training and was on 1 November 1966 promoted to the post of probationary police inspector and was confirmed as an inspector in 1968 after passing the required examination. He however resigned after 19 years of serving in the Royal Malaysian Police Force and his alleged reasons were that he was consistently overlooked for promotion despite the fact that he was fully qualified meritoriously and the vacancies in the state and outside were earmarked for officers from the Peninsular Malaysia despite the availability of qualified officer like him. Accordingly to the first plaintiff, his non-promotion was due to the fact that the Borneonisation of the Royal Malaysia Police Force, a Federal Public Service in Sabah, as assured in the Malaysia agreement and the Intergovernmental Committee report, have not been fully implemented.

[4] As for the second plaintiff, the second plaintiff in April 2002 accepted the offer from Jabatan Pendidikan Negeri Sabah to teach as a temporary teacher on a one year contract and was posted to SK Ulu Bole, Sipitang, Sabah. His appointment as temporary teacher continued until 2005 when the same was terminated by the principal of the school who informed the second plaintiff that his services was no longer required by the department. The second plaintiff's reasons as to why his services were terminated are as summarised by learned counsel for the defendants as follows:

(a) there were vacancies for teaching position available for the primary level

not only at SK Ulu Bole, Sipitang and also other primary schools in the other parts of the state particularly in rural areas;

(b) there were teachers from Semenanjung Malaysia who were posted to various schools in the district of Sipitang and elsewhere in Sabah months after his services as terminated;

(c) the failure by the defendants to consider 200 graduates who have education degrees and waiting to posted as teachers despite the existence of vacancies for the teachers in the rural area;

(d) all his application to be considered for *kursus dalam cuti* was unsuccessful; and

(e) the policy of the Ministry in the intake for the teachers training institutes in the ration of 40:30:30 is an open defiance of the Borneonisation programme;

THE PLAINTIFFS' POSITION

[5] Without going into details, the plaintiffs' case is simply premised on Malaysia agreement dated 9 July 1963. Under the agreement, there are provisions requiring the signatories therein to ensure assurances, undertakings and recommendations agreed are implemented. The relevant articles and annexes are as follows:

Article II:

The Government of the Federation of Malaya will take steps as may be appropriate and available to them to secure the enactment by the Parliament of the Federation of Malaya of an Act in the form set out in Annex A to this Agreement and that it is brought into operation on 31 August 1963 (and the date on which the said Act is brought into operation is hereinafter referred to as 'Malaysia'.

Article III:

The Government of the United Kingdom will submit to her Britannic Majesty before Malaysia Day Orders in Council for the purpose of giving the force of law to the Consultations of Sabah, Sarawak and Singapore as States of Malaysia which are set out in Annexes B, C and D to this Agreement.

Article VIII:

The Government of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other action as may be required to implement the assurances, undertakings and recommendations contained in Chapter 3 of, the Annexes A and B to, the Report of the Inter-Governmental Committee signed on 27.02.1963, in so far as they are not implemented by express provision of the

Constitution of Malaysia.

Annex B

Public Service:

The Interim Period:

5. Borneonisation of the Public Services in the Borneo States is a major objective of policy. For a number of years to come special arrangements will be necessary to secure this objective and to protect the legitimate interests of Native peoples. There are two problems to be given to Native over other candidates for State and Federalized and the laying- down of suitable schemes of service.

6. In relation to the State Service there will be provision in the State Constitution on lines of Article 153of the Federal Constitution to empower the State Government to prescribe, from time and time, the extent which preference will be given to Natives. The term 'Native' will be defined in the Constitution by adopting —

(i) in Sarawak the definition in the Sarawak Interpretation Ordinance; and

(ii) in North Borneo the definition that will appear in the State Constitution.

Similarly the State Government will prescribe in respect of the State Services recruitment is needed the State may either make its own arrangements through the Department of Technical Co-operation or from any other sources acceptable to the Federal Government or ask for the help of the Federal Government.

9. To reassure officers seconded or transferred to the Federal Public Service, and to reassure officers in the States that Borneanisation will be given first priority in the Federalised Departments, the Federal Constitution will provide for the establishment of a separate branch of the Federal Public Service Commission in each state. Subject to the directions given to them in relation to Borneanisation and schemes of service, these branches will have full authority, except as provided in paragraph 2 above, in respect of all appointments, promotions and discipline in the Federalized Departments, saving that the discipline of seconded officers will be a matter for the State Public Service Commission. The Federal Government will undertake that the members of these branches will be the members of the respective State Public Service Commissions together with not more than two members of the Federal Public Service Commission nominated by the Federal Government. These arrangements will be subject to review five years after Malaysia Day. While they are in force the State Government will consult the Federal Government before making any new appointments to the State Public Service Commissions.

In simple English, the Plaintiffs are saying that the 1st and 2nd Defendant had breached their obligations provided for in the Malaysia Agreement and because of this breach, they had suffered in their employment.

[6] It is the plaintiff's contention that the first and second Defendants being signatories to the Malaysian Agreement had failed to honor the above provisions and because of this failure, they have suffered in their former employments.

GROUNDS OF THE FIRST AND SECOND DEFENDANTS' APPLICATION

Law

[7] In a striking out application, suffice for me to refer to the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7 where His Lordship Mohamed Dzaiddin bin Hj Abdullah SCJ (as he then was) sets out the principle of striking out and it is this:

> At p 11(e–h):
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> The principle upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to be summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wilkinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (see *AG of Duchy of Lancaster v L & NW Rly Co*). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (see *Wenlock v Moloney & Ors*) … The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[8] Learned counsel for the defendants rely on five grounds to submit that the plaintiffs' case is obviously unsustainable and I shall deal with them in the order as submitted by learned counsel for the defendants.

Locus standi of the plaintiffs

[9] The courts both locally and in the Commonwealth have adopted two approaches in determining the 'locus standi' of a party coming to court to seek declarations similar to that of the plaintiff here.

[10] Respective learned counsel have taken opposing approaches with learned counsel for the defendants taking the narrow approach with learned counsel for the plaintiff taking the liberal approach.

[11] The narrow approach is reflected in the opinion of Buckley J in *Boyce v Paddington BC* [1903] 1 Ch 109 which states as follows:

> A plaintiff can sue without joining the attorney-general in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with (eg where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

[12] It is learned counsel for the defendants contention that the plaintiffs' compliant of the defendants' failure from 1963 till to date in implementing the Borneonisation programme might be prejudicial to the plaintiffs' interest but it does not affect the plaintiffs' private rights. As such the plaintiffs had not complied with the requirements as set out in the *Boyce* case. Learned counsel for the defendants also refers the court to the case of *Karpal Singh v Sultan Selangor* [1988] 1 MLJ 64 whereby His Lordship held:

> At p 67 (E–I):
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> … I would firmly say that an action may not be brought to court by a stranger to it. Indeed, generally, a person may not institute declaratory proceedings in respect of an act which, although prejudicial to his interest, may not affect him in his private rights (see *Guaranty Trust Co OF New York v Hannay & Co*) per Pickford LJ that 'it does not extend to enable any stranger to the transaction to go and ask the court to express its opinion in order to help him on other transaction.
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> There are various approaches which a court may adopt in deciding the question of locus standi. One approach is to ask whether the plaintiff has 'a cause of action'. Another approach is to determine whether the plaintiff can establish a 'right' which the court may declare. Yet another approach is to require the plaintiff to demonstrate 'a special injury' resulting from the subject matter of the declaration. A fourth approach requires the plaintiff to have an 'interest' in the subject matter of the declaration to be litigated. A final approach leaves the question of standing to be determined by the court in the exercise of its discretion.

[13] Learned counsel for the plaintiffs however urges the court to adopt the liberal approach which is set out by Abdoolcader J in *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177:

> The sensible approach in the matter of locus standi in injunctions and declarations would be that as a matter of jurisdiction, and assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice.

[14] Applying the above approach, learned counsel for the plaintiffs submits that the plaintiffs as Sabahans have 'sufficient interest' in the subject matter sought to be adjudicated in that they have every right to seek remedy in court to ensure that what had been agreed in the Malaysia agreement are complied with by the defendants.

[15] I shall now discuss some of the pertinent cases in mis area of law. The much quoted case of *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 provides a good starting point for my deliberation. In that case, the leader of opposition had sought an injunction against United Engineers (M) Sdn Bhd from signing an agreement with the Federal Government and one of the preliminary issue is whether the leader of opposition being a member of parliament, a regular user of highways or a taxpayer had the locus standi to launch his action. The majority of a five member bench of the then Supreme Court held that the opposition leader had no locus standi and a relator action would be the proper course. The rationale of the majority through the judgment of the then Lord President Salleh Abbas was that the opposition leader's interest was not directly affected over and above the interest of the other spectrum of society. In short they applied the first test as set above. The minority opinions were that of Abdoolcader SCJ and Seah SCJ who both lamented that the view of the majority represents 'a retrograde step (in the development of administrative law) and would have the indirect effect of placing governmental actions outside the purview of judicial control and therefore above the law'. The next case I wish to refer is *Sabil Milia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325; [2005] 2 CLJ 122 where the Court of Appeal through the judgment of Gopal Sri Ram JCA in obiter had expressed the view that had the opposition leader brought 'a similar action today, we have no doubt that he would be accorded locus standi in view of O 53 as it presently stands'. Such pronouncement in my view signals the direction of the local courts towards the second approach of 'sufficient interest' approach.

[16] Such approach was expressly adopted the recent Court of Appeal case of *Lembaga Lebuhraya Malaysia v Semenyih Jaya Sdn Bhd* [2010] MLJU 1737; [2011] 3 CLJ 159 (CA), where the majority applied the 'sufficient interest' test and this is how they put it:

> This appeal concerns one issue only. It is as to whether the appellant applicant has the locus standi to make an objection as to the 'amount of compensation' awarded by the land administrator of the district of Ulu Langat for the matter to be referred to the High Court for determination pursuant to the LAA …
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> …
>
> It is our majority judgment that the appellant applicant has the necessary locus standi to bring this reference. The appellant applicant has 'sufficient interest' in the matter.

There is a growing tendency towards liberalisation of the rule of locus standi to seek judicial redress against complaints of maladministration (see Bernard Schwartz, *Administrative Law — A Case Book*, (2nd Ed), pp 632–659 [1983]). It may be argued that if the rule of standing is given its strict interpretation then there may arise a situation when there is no one qualified enough to bring an action in court. If that were to happen, then any bad administrative order may not be reviewed. This would imperil the rule of law. The rule of standing has to be relaxed and enlarged so that the class of persons who are entitled to go to the courts to protest against arbitrary decisions of the administrative bodies and seek redress is widened.

The applicant in *Regina v Secretary of State for Foreign and Commonwealth Affairs, Ex parte Rees-Mogg* [1994] QB 552 sought for a declaration that the UK government could not lawfully ratify the treaty on European Union. The court accepted that the applicant had the necessary locus standi to file the case because in the words of Lloyd LI at p 562, the applicant brought 'the proceedings because of his sincere concern for constitutional issues'.

The court in *R v Inspectorate of Pollution And Another, ex parte Greenpeace Ltd (No 2)* [1994] 4 All ER 329 gave locus standi to Greenpeace, an environmental organisation, to seek certiorari on the ground that the prime object of Greenpeace is to protect the natural environment. Otton J in his judgment at p 350, aptly said:

> I have not the slightest reservation that Greenpeace is an entirely responsible and respected body with a genuine concern for the environment.

[17] I had the opportunity to deal with this issue of locus standi in the recent case of *Robert Linggi v The Government of Malaysia* [2011] 2 MLJ 741; [2011] 7 CLJ 373 where the facts of which are these. The plaintiff there sought declaration from the court that certain amendments to the Federal Constitution were unconstitutional and this is what I said:

> The plaintiff, as a Sabahan, in my view is genuinely concerned with the erosion of the rights of Sabah in so far as 'the constitution and jurisdiction of the High Court in Sabah and Sarawak and the appointment, removal and suspension of judges of that court' since it concerns an attempt to uphold the Federal Constitution, I have no hesitation in finding that the plaintiff has the 'locus standi' to bring this action. I am fully aware of the argument that this may encourage litigation but in my view when there is a challenge concerning any dismantling of the Supreme Law of the country, litigation should be encouraged. In any event, all Malaysians have a duty to protect our constitution.

[18] There I had applied the 'sufficient interest' approach in that case and learned counsel for the defendants with respect had not given any reason why I should depart from my earlier approach.

[19] In the case at hand, the plaintiffs are also seeking declarations whether

the Malaysian agreement had been breached which, of course, is different to the *Robert Linggi*'s case which as stated before concerns the illegality of specific constitutional amendments.

[20] Certain assurances were given by the respective signatories to the Malaysia agreement and it is the contention of the plaintiffs that these assurances had been breached. Do the plaintiffs have 'sufficient interest' under such circumstances? In my view the importance and significance of the Malaysian agreement to the people of Sabah is immense for the simple reason that it is the very document which gave birth to this nation known as Malaysia. To state and repeat the obvious, without the Malaysia agreement, there is no Malaysia. Any breach to that agreement affects the lives of all Sabahans and the basic structure of federal and state government relationship upon which Malaysia was formed. The plaintiffs as Sabahans and like Mr Robert Linggi, in my view, have every right to come to court to ensure that assurances given by the signatories in the Malaysia agreement are adhered to. These assurances were promised to them and the rest of the population of Sabah and to hold that they have no locus standi in my view defeats their constitutional right of access to court.

[21] I am aware of the contention of learned counsel for the defendants that the plaintiffs should have first sought the consent of the attorney general. With respect, I can do better but to quote what the learned author Andrew Harding said at p 260 in his book 'Law, Government and the Constitution in Malaysia, 1996', on the role of the attorney general in a relator action:

> The failure of the majority to develop the law in [Lim Kit Siang] is unfortunate. The reliance on the AG as the guardian of the public interest is difficult to understand: it is hardly likely that the AG would take such action against his political masters. The identity of the litigant is really an irrelevant issue when the courts consider serious allegations of abuse of power.

[22] Similar sentiment is expressed by the Supreme Court of Ireland in *The Society for the Protection of Unborn Children (Ireland) Ltd v Diarmund Coogan & Ors* (1988 No 7714P), where the court in its judgment held as follows:

> Every member of the public has an interest in seeing that the fundamental law of the State is not defeated, and although the courts are the ultimate guardian of the Constitution, such protection is possible only where their powers are invoked. Since breaches of constitutional rights may on occasion be threatened by the Government itself or its agents, it would be intolerable if access to the courts to defend and vindicate such constitutional rights were confined to the attorney general as the very officer of state instructed to defend the Government's position.

[23] During oral arguments, learned counsel for the defendants had also

raised the concept of 'privity of contract' in that the plaintiffs were not parties to the Malaysian agreement and hence had no right to sue under that agreement. With respect, the signatories were only trustee to the population of Sabah. My reasons for stating this are these. Prior to the formation of Malaysia, the views of the peoples of North Borneo and Sarawak were sought for through the formation of the Cobbold Commission headed by Lord Cobbold which held numerous meetings with the various ethnic communities. The Commission in its report had recommended the formation of the Federation of Malaysia would be in the interests of the North Borneo and Sarawak. The Commission's recommendation was accepted by the legislative assembly of North Borneo and the Council Negeri Sarawak. Thereafter, an Inter-Government Committee was formed with its members from the British, Malayan, North Borneo and Sarawak government. The purpose of this IGC was to ensure that certain safeguards were accorded to North Borneo and Sarawak. The result of the works of the IGC is contained in the IGC report dated 27 February 1963 which in essence contains recommended safeguards to be included in the Malaysia agreement and these can be found in article II, III and VIII which are set out earlier in my judgment. These safeguards are conditions precedent for the peoples of North Borneo and Sarawak in the formation of Malaysia. Hence in view of circumstances which gave birth to the Malaysia agreement, the signatories to it signed as trustee to the peoples of North Borneo and Sarawak who are the beneficiaries. As such I reject the contention that the plaintiffs are not privy to the Malaysia agreement as they are beneficiaries.

[24] For reasons stated above, I find that the plaintiffs have the locus standi to pursue this action.

Non-justiciable issue

[25] Learned counsel for the defendants refer the court to the case of *Tengku Muhammad Fakhry Petra lbni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2011] 1 MLJ 128; [2010] 1 LNS 1390 whereby His Lordship Mohamad Ariff Md Yusof sets out the meaning of non-justificiable issue:

> Non-justiciable Issues
>
> In connection with the unconstitutionality of legislation, we have seen that even where a fundamental right has been invaded by a statute, the individual who is affected thereby may not have a remedy from a court of law, because the issue involved is not justiciable.
>
> … The most prominent amongst non-justiciable issues are those which are known in the USA as 'political questions', which means that the subject matter of the question is such that it is not capable of a judicial determination.

The learned authors of *De Smith's Judicial Review* (6th Ed), have also appropriately observed in this connection that despite the wholesome development of administrative law, 'the fact remains, however, that there are some issues which are inherently unsuited to adjudication' and in this category of case, 'the Court acknowledges that the litigation process and the expertise of the Court are unsuited to resolving the question in hand' (at p 121).

A good definition of 'justiciability' can also be found in Chris Finn, The Concept of 'Justiciability' in Administrative Law' in Groves & Lee, Australian Administrative Law (2007):

> The term 'justiciability' refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the executive and the judiciary. Thus, a matter may be deemed 'non-justiciable' by a Court which feels that its resolution either is beyond the institutional competence of the Court or would involve stepping outside its appropriate constitutional role (at p 143).

[26] Relying on the above, learned counsel for the defendants submit that the plaintiffs' relief involves the exercise of powers and policy consideration by the first and second defendants which are not justiciable. Further, it is submitted that the plaintiffs' challenge to the exercise of the prerogative power of the Yang di-Pertuan Agong under art 153(2) of the Federal Constitution to ensure the reservation for the natives of the State of Sabah such reasonable number of positions in the public services of the federal government, in particular in the federal departments in the state government is not justiciable. Learned counsel for the defendants also refer the court's attention to the Supreme Court case *Government of Malaysia v Lim Kit Siang, United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12; [1988] 1 CLJ (Rep) 63 which provides as follows:

At p 66(a–b):

> Finally if the objection of the respondent to the NSH contract is based on the ground of its excessive costs and unfairness to UEM's rivals, the jurisprudence of the court is that it is not for the court to interfere in the matter because the wisdom and policy decision of the Government belongs to the Government. We cannot tell the public authority how to exercise its power (per Lord Justice Lawton in *Blackburn's case* [1980] TLR 13 at p 15). Consequently, all those figures and reports showing economic feasibilities for and against the project are absolutely irrelevant and serve no purpose.

[27] I have no doubt what is stated in the above two cases on the concept of 'non-justiciable' represents the law in this country. But it is my view that the factual matrix in this case is not the same as those in the cited cases.

[28] What I have before me is not so much a complaint against a failure to implement a policy of the government of the day but a contention that the defendants have not complied with the terms of the Malaysia agreement. There is no attempt here by the plaintiffs' questioning the policy of the government of the day. It is pure and simple question of whether the Malaysia agreement had been complied with by the defendants as they had agreed to do so by virtue of their signatories to it. Accordingly I reject the contention of the defendants on this issue.

Vague pleadings

[29] With respect, I disagree with learned counsel for the defendants that the pleadings are vague. As I have stated above, it is quite clear that the plaintiffs' claims relate to a breach of the assurance given by the defendants in the Malaysia agreement. There is nothing vague about what they want. Whether or not the plaintiffs have proved their cases is an issue which is triable and to be determined at the hearing proper. One must be mindful is that before me is an application to strike out and all the plaintiffs need to show is if there is a triable issue, the application to strike out should not be entertained.

Scandalous, Frivolous, Vexatious

[30] Learned counsel for the defendants premise this contention on the following grounds:

(a) the plaintiffs' application is premised on dissatisfaction and personal grievances;

(b) the plaintiffs'claim is time barred; and

(c) the declaratory orders sought for serve no useful purpose.

Ground (a) — application premised on dissatisfaction and personal grievances

[31] With respect it may very well be that the plaintiffs were not happy as to how they perceived they were treated but the reliefs sought here are not reinstatement to their position or damages. What they seek for are as stated in the declarations which is not connected to their satisfaction.

Ground (b) — time barred

[32] Learned counsel for the defendants contends that this application is an attempt to circumvent the time bar imposed on them by virtue of s 2(a) of the Public Authorities Protection Act 1948 which provides as follows:

2 Protection of persons acting in execution of statutory or other Where, after coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —

(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act neglect or default complained of or in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;

(b) …

Provided that this provision shall not affect costs on any injunction in the suit or action.

[33] In support of his contention, learned counsel for the defendants refer the court to case of *Ronald Beadle v Hamzah HM Saman & Ors* [2007] 2 MLJ 201; [2007] 1 CLJ 421 where the Court of Appeal at p 209 (MLJ); p 432 (CLJ) held:

Two sets of situations are therefore envisaged for the limitation periods stipulated therein to arise. The first set deals with where the 'act, neglect or default complained of referred to is confined to a single act, neglect or default and does not involve an element of continuance thereof and that a single act per se would constitute a complete cause of action (see *(Malaysia) Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 (SC)).

The other set is where the limitation period begins to run when the injury or damage ceases (see *Ibrahim bin Mohideen Kutty v Timbalan Menteri Dalam Negeri, High Court* [2003] 6 CLJ 144).

This section was also succinctly explained by Wan Sulaiman J (as he then was) in the case of *Mak Koon Yong & Anor v Municipal Councillors, Malacca* [1967] 1 ML] 256; [1967] 1 LNS 98. After referring to the English Court of Appeal case of *Carey v Metropolitan Borough of Bermondsey* 20 TLR the learned judge said this at p 259:

Court of Appeal held in respect of that section of the English Act which is in pari materia with our s 2(a) that 'the language of the section was reasonably plain and it was manifest that the continuance of the injury or damage meant the continuance of the act which caused the damage.' *Time would therefore begin to run for the purposes of the Ordinance, from the time when the act was caused, not from the time when the injury or damage ceased, or in the case of a continuing injury or damage, when the act causing the injury or damage ceased.*

Indeed in *Carey v Bermondsey Borough Council* [1906] 94 LT 216 the word 'continuance' found in s 1 of the Public Authorities Protection Act 1893 of the United Kingdom was construed to mean 'a continuing cause of action' or the continuance of the act which caused the damage (see also *Markey v Tolworth Joint Isolation Hospital District Board* [1900] QBD 454).

[34] In the recent case of *Balare Jabu & Ors v Merawa Sdn Bhd & Ors* [2011] 4 CLJ 751 where the Court of Appeal dealt with a similar contention in the context of native customary rights in Sarawak concerning s 2(a) of the Public Authorities Protection Act 1948 which through the judgment of Abdul Wahad Patail JCA said as follows:

> While limitation appears to be a complete answer to a suit, action or proceeding for remedy, it is no answer to a suit, action or proceeding for declaratory orders. A declaration whether the issuance of a licence is subject to native customary rights and whether the second and third respondents were in breach of a fiduciary duty pertaining to constitutional rights of the appellants, to know whether they have been wronged or not, is not purely academic. Even if it is without orders for compensation or damages, it serves the purpose of providing some solace to the appellants. And they have only their trust to rely upon that the government is committed to and will do what is right. We do not think such trust is misplaced for no legitimate government intends to act unfairly or unjustly per se or in breach of its subjects' constitutional rights. Injustice or unfairness happens only by mistake or unintended error which a true government will seek to remedy without necessity of an order for compensation and damages.

[35] The dicta of Abdul Wahad Patail JCA in my view on the face of it raise a triable issue which requires full arguments at the hearing of the application proper. Hence I express no view on this issue until the hearing proper.

Ground (c) — no useful purpose in the reliefs prayed for

[36] Learned counsel for the defendants in support of this ground rely on the case of *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64 whereby His Lordship Abdul Hamid CJ Malaya held:

> At p 66(I):
>
> The plaintiff has by his originating summons sought a declaration. It is fundamental principle that declaration will not be made if the application for it is embarrassing or the declarations can serve no useful purpose: See *Mellstorm v Garner & Ors* [1970] 2 All ER 9.
>
> At p 66(A–D):
>
> The learned attorney-general has referred to a textbook on *Declaratory Orders*, (2nd Ed), by PW Young, on the conditions for declaratory orders and has submitted that one of the conditions to be satisfied is that (a) there must exist a controversy between the parties; (b) the proceedings must involve a 'right'; (c) the proceedings must be brought by a person who has a proper or tangible interest in obtaining interest in obtaining the order; (d) the controversy must be subject to the court's jurisdiction; and (e) it must not be merely of academic interest, hypothetical or one whose resolution would be of no practical utility.

> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought. (*The Russian Commercial & Industrial Bank v British Bank for Foreign Trade* [1921] 2 AC 438 at p 448 per Lord Dunedin).

[37] With respect to learned counsel for the defendants, I prefer the view of Abdul Wahad Patail JCA in *Balare Jabu*'s case where he held that even if there is no claim for compensation or damages, it does not mean that claim is academic and serves no purpose. Providing solace to the plaintiffs is adequate in the context of this case as it involves a trustee and beneficiary relationship under the Malaysia agreement in which the beneficiary plaintiffs expect no less than for the defendants to do what is right.

Abuse of the court's

Hearsay evidence

[38] Learned counsel for the defendants' contention here is simply that the plaintiffs' case is wholly premised on hearsay evidence in the form of newspapers' articles and since they are not admissible, the plaintiffs' case is a non starter.

[39] The case of *Karpal Singh v Sultan Selangor* was also cited in support of the contention. Abdul Hamid CJ (Malaya) in that case held:

> At p 65(G–I):
>
> Before I consider the grounds, I would, in passing, observe that the sole foundation of the originating summons is the statement allegedly by the Sultan as reported in the *News Straits Times* and *The Star* newspapers on 27 July 1987. There is no affidavit before the court affirmed to by the reporter concerned stating that he had heard the Sultan made such statement. The press reports of what the Sultan is reported to have said would appear to be inadmissible as hearsay. The fact that the Sultan has not contradicted the press reports does not, in my view, make the slightest difference for it is well- established that inadmissible evidence does not become admissible by reason of a failure to object …
>
> At p 66(C):
>
> Without the press reports, what other evidence is there to show what the Sultan said on the occasion concerned? In my view, therefore, the originating summons founded upon such premises may be held to be groundless.

[40] With respect, I agree with learned counsel for the plaintiffs that the triable issue here is whether or not there is a failure by the defendants in implementing the agreed policy of Borneonisation of the federal public service

in the State of Sabah and as to whether the plaintiffs had discharged the burden of proof is best left to the hearing proper.

Evading O 53 of the Rules of the High Court 1980.

[41] It is submitted by the defendants that the declaration sought by the plaintiffs are in effect to quash the decisions of public authorities and hence the plaintiff should have sought their reliefs through O 53 of the RHC. With respect, a cursory glance at the reliefs show that there is no relief seeking to quash the decision of any public authorities for their predicament. The declarations sought for are self explanatory. Again the plaintiffs are asking to court to adjudicate whether the defendants had breached the Malaysia agreement and in my view an O 53 of the RHC application is unsuitable when it concerns the rights of a Sabahan in the context of the formation of Malaysia.

[42] In any event, the Federal Court has spoken on the use of O 53 of the RHC to determine the constitutional rights of natives of Sarawak in *Bato Bagi & Ors v Kerajaan Negeri Sarawak and another appeal* [2011] 6 MLJ 297; [2011] 8 CLJ 766. One of the issues there is this:

> Whether the respective learned High Court judges were correct in disposing of both the matters by way of O 14A or equivalent in order to decide on the constitutionality of the impugned sections.

[43] Richard Malanjum, Chief Judge of Sabah and Sarawak answered that issue in the following manner:

> 71. However, in the course of their judgments the Court of Appeal in both the cases went on to conclude on the constitutionality of the impugned sections, procedural fairness and O 53 of the Rules of the High Court 1980. And this brings me to the second determinative issue …
>
> 100. I would like to make another note on the use of O 53 of the Rules of the High Court 1980 in cases involving native customary rights. This point was touched upon in *Jalang*'s case by the courts below. With respect, I find that it is highly unfair and prejudicial to insist upon the natives to proceed by way of Or 53 when they seek to enforce a constitutional right by way of a declaration to that effect.
>
> 101. Although it does, to a certain extent, fall within the realm of public law, I am of the view that it tilts more towards the vindication of a private right which is recognised both under statute and at common law (which pre-existed statute). As such, the natives should be at liberty to proceed by way of an ordinary civil suit. Another way of looking at it is to consider it as an exception to the *O'Reilly v Mackman* [1982] 3 All ER 1124 principle.
>
> 102. I therefore prefer to approve the recent decision of the High Court in *Nikodemus Singai & Ors v Sibu Slipway Sdn Bhd& Ors* [2010] 10 CLJ 383

to that of *Shaharuddin Ali & Anor v Superintendent of Lands and Surveys, Kuching Division & Anor* [2004] 4 CLJ 775.

[44] Not only do I agree with the Chief Judge of Sabah and Sarawak, I am bound by his dicta which in my view is equally applicable to the kind of rights possessed by the plaintiffs in this case.

CONCLUSION

[45] For reasons stated above, I find that this is not a plain and obvious case in which the court should exercise its discretion to strike out. Accordingly I dismiss the applications by the defendants with no order as to costs.

Defendants' applications dismissed with no order as to costs.

Reported by Ibnu Aswan